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No. 240

In the Supreme Court of the United States

OCTOBER TERM, 1939

FRANK CARMINE NARDONE, NATHAN W. HOFFMAN, AND ROBERT GOTTFRIED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

No opinion was rendered by the District Court of the United States for the Southern District of New York. The opinion of the Circuit Court of Appeals (R. 358–363) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 28, 1939 (R. 364). The petition for a writ of certiorari was filed on the same day. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by

the Act of February 13, 1925. See also Rule XI of Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial court committed reversible error in limiting the petitioners' inquiry into the source of Government evidence, alleged to have been obtained as a result of the unlawful interception of certain telephone communications.

STATUTE INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103 (U. S. C., Title 47, Sec. 605), provides that—

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no

person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. [Italics supplied.]

STATEMENT

Petitioners, together with certain other defendants who did not appeal to the Circuit Court of Appeals, were convicted in the United States Dis-

trict Court for the Southern District of New York on an indictment [1] (R. 10–21) charging in two counts the smuggling and concealing of alcohol, in violation of the Tariff Act of 1930 (U. S. C., Title 19, Sec. 1593 (a) and (b)), and in one count a conspiracy to smuggle and conceal alcohol in violation of Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88). A verdict of guilty on all counts was returned on March 23, 1939 (R. 7, 326–327). On March 24, 1939, the petitioners were sentenced as follows (R. 7–8, 328–334): Frank C. Nardone to a term of two years on each count, the sentences to run concurrently, and a fine of $3,000; Nathan W. Hoffman to a term of two years on each count, the sentences to run concurrently, and a fine of $2,500; Robert Gottfried to a term of one year and one day on each count, the sentences to run concurrently.

During the trial several offers were made by the defendants to prove that the testimony of various Government witnesses, nineteen in all (R. 279), presented evidence which was alleged to have been obtained as a result of the unlawful interception of telephone messages. These offers of proof, which were accompanied by motions to strike such testimony (R. 46, 94, 138, 142, 157), were denied over objection and exception.

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[1] The judgments of conviction of petitioners Frank C. Nardone and Robert Gottfried under a previous similar indictment (in which petitioner Nathan W. Hoffman was not named as a defendant) were reversed by this Court in *Nardone* v. *United States*, 302 U. S. 379, because of the introduction in evidence by the Government of certain intercepted interstate telephone communications.

At the instance of the defendants the trial court, upon conclusion of the Government's case, conducted an inquiry for the purpose of ascertaining whether any of the Government's evidence resulted from wire tapping (R. 265–300). With this end in view, the defendants, out of the presence of the jury (R. 265), called as their first witness one Joseph A. Kozac (R. 266), a Government agent who had testified as to the contents of certain intercepted messages at the previous trial.[2] The substance of Kozac's testimony was to the effect that he had not known of the existence of certain of the defendants prior to the interception of the telephone communications. During Kozac's examination, defendants were called upon and admonished by the court to attack specific portions of the evidence (R. 279) and to demonstrate that the testimony of any particular witness, or any other evidence, was obtained exclusively from an illegal source (R. 286). The court assured the defendants it would hear them upon any testimony which would establish that specific evidence was so obtained (R. 279, 286). The court told defendants they had no right "to go fishing" (R. 285) and finally said (R. 286):

> The Court, after listening to one witness, concludes as matter of fact that this testimony is incoherent and not conclusive; that the Court now offers to hear an attack on

[2] See footnote 1, *supra*, p. 4.

> any special part of the testimony that any attorney in the case believes he can fairly attack, as believing it came from no other source, and in default of that I rule the discovery of the complaint has nothing to do with the evidence.

After the court rejected defendant's offer of evidence as to specific intercepted communications, the Government was permitted to call one William E. Dunigan (R. 290–300), supervisor of the investigation in the instant case, whose testimony was in substance that various telegrams and money orders introduced in evidence were not obtained as a result of wire tapping (R. 290); that much of the information he procured concerning the case was revealed to him by informers both prior to the installation of the wire taps and during the time the "taps" were being taken (R. 290, 292, 295); that other material evidence did not result from the intercepted messages (R. 291, 293); that it was after March 20, 1936 (when the tapping was apparently discontinued, see R. 266), that the defendants' connection with the "Southern Sword" (one of the smuggling vessels) was established without reference to the wire taps; and that certain witnesses, members of the crew of the "Southern Sword", were unknown to him prior to the discontinuation of the tapping (R. 293). The witness also stated that if the "taps" had been the only information available to the Government there would never have been a seizure in the case (R. 295).

Upon appeal to the Circuit Court of Appeals for the Second Circuit the judgments of conviction were unanimously affirmed (R. 358–364).

ARGUMENT

Petitioners' primary contention[3] is that reversible error resulted from the trial court's refusal to allow a continuance of their inquiry into the source of Government evidence, alleged to have been obtained as the result of the unlawful interception of certain telephone communications which were introduced at the former trial,[4] and in denying, over their objection and exception, their motion to strike such evidence. In effect the petitioners contend that the action of the trial court, in rejecting their offer of proof as to the extent to which the Government's case was the fruit of unlawfully intercepted messages, denied a full and

[3] Petitioner Nardone presents another contention in the petition for certiorari (p. 8) which is not argued in the supporting brief. It is asserted that it was error to have allowed one Murphy, a sailor on the vessel "Isabel H", which was engaged in the illicit activities, to testify as to a paper, shown to him by the ship's wireless operator, purporting to be a list of the owners of the "Isabel H" which contained the name of petitioner Nardone.

The point was adequately dealt with in the opinion of the Circuit Court of Appeals (R. 361) and, in any event, as was pointed out by that court, "no great harm is done by the testimony, as Nardone was amply connected [with the conspiracy] without it." It is obvious that the question is not one which would warrant the granting of a writ of certiorari.

[4] See footnote 1, *supra*, p. 4. None of the intercepted messages admitted at the former trial was, however, introduced in evidence at the trial in the instant case.

complete inquiry into the question of the admissibility of the Government's evidence. Without waiving any contention as to this point, we submit that it is unnecessary for this Court to consider the petitioners' contention since, even if it had been established that the Government's case was in part predicated upon leads obtained through wire tapping, this fact would not have entitled the petitioners to a reversal of their convictions.[3]

The Circuit Court of Appeals held that it was unnecessary to decide such questions as whether the unlawful interceptions tainted all other evidence procured through them, whether the burden rested upon the accused or the prosecution to show to what the taint extended, how the inquiry should be conducted, and whether it was too late to leave the inquiry until the trial. This was because, the court said, under the decision of this Court in *Olmstead* v. *United States*, 277 U. S. 438, which it still regarded as the law, telephone tapping is not in itself an unlawful search under the Fourth Amend-

[3] For the same reason we deem it unnecessary in this brief, without waiving any contentions as to them, to consider the questions whether the petitioners should have initiated the inquiry attempted by them prior to trial and whether, assuming that the petitioners were granted a full and fair inquiry, they established that any of the Government's evidence was made accessible by reason of the wire tapping, as well as the questions suggested in the petition for writ of certiorari (Pet. 7–8) as to whether intrastate messages are under the ban of Section 605 of the Federal Communications Act and whether it is incumbent upon defendants, objecting to evidence, to show that the messages intercepted were of an interstate character.

ment, with the result that no other consequence could attach than would attend the acquisition of evidence by means of an ordinary crime; i. e., "the common law * * *. prevails, and the court will not look beyond the character of the evidence itself." The court found nothing in the recent decision of this Court in *Nardone* v. *United States*, 302 U.S. 379, which is inconsistent with the holding in the *Olmstead* case, since in the *Nardone* case this Court decided only that Section 605 of the Federal Communications Act forbade the introduction in evidence of interstate telephone communications intercepted by Federal officers. The court concluded that, although the statute rendered inadmissible the intercepted messages themselves, it did not also make incompetent any evidence which had become accessible by reason of the wire tapping, and that, consequently, the defendants in the case at bar had no right to a discovery of the source of the Government's evidence.

The court also expressed the view that if the *Olmstead* case should be deemed to have been overruled, it might possibly be that not only the actual talk overheard would be incompetent but also any evidence obtained by means of the interceptions, although there were no decisions which, in its opinion, extended the constitutional doctrine to this extent. The court felt, however, because of the virtual impossibility of defendants establishing that the Government's evidence was tainted by reason of the unlawful tapping, unless there is a complete disclosure of its case by the Government, with

the attendant embarrassment to the prosecution resulting therefrom, that these considerations may well result in qualifying any such supposed doctrine by restricting incompetency to the actual communications unlawfully intercepted.

1. It seems clear, we submit, that if the *Olmstead* decision is still the law and has not been overruled by the *Nardone* decision, there is no constitutional prohibition against wire tapping by federal officers and, consequently, there can be no constitutional prohibition against the utilization in a Federal criminal prosecution of evidence obtained through leads resulting from wire tapping.* So far as such evidence is concerned, it stands upon the same plane as any other evidence which may have been obtained as the result of an illegal or criminal act not amounting to a violation of the Fourth Amendment.* It is well settled, as was pointed out in the *Olmstead* case (p. 467), that evidence thus obtained is not inadmissible; that the courts will not take notice of the manner in which the evidence may have been obtained. All that the *Nardone* decision held was that Section 605 of the Federal Communications Act prohibited Federal officers from divulging in court the contents of interstate telephone communications which they had intercepted. In the instant case there was admittedly

*For present purposes it is assumed that not only the divulging but also the interception of an interstate telephone communication is prohibited by Section 605 of the Federal Communications Act and made a crime by Section 501 of that Act, (U. S. C., Title 47, Sec. 501).

no divulging in court of the contents of any communication obtained through wire tapping. There is nothing in the *Nardone* decision, or in the Federal Communications Act itself, which declares inadmissible evidence obtained through leads resulting from wire tapping. It follows, therefore, that petitioners were not entitled to a discovery of the source of the Government's evidence.

2. Even if the *Olmstead* case may be treated as having been overruled and wiretapping considered as forbidden by the Fourth Amendment, or even if, as the petitioners seem to contend, Section 605 of the Federal Communications Act may be deemed to afford a protection as broad as would be that of the Fourth and Fifth Amendments, we submit that the petition for writ of certiorari should, nevertheless, be denied. The petitioners cite no case which goes to the extent of holding that not only the illegally seized evidence itself is inadmissible but also that evidence obtained as the result of leads arising from the illegally seized evidence is incompetent. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, strongly relied upon by the petitioners, certainly does not so hold. There the question presented was simply whether a defendant could be compelled by subpoena to produce before a grand jury documentary evidence knowledge of the existence of which had been acquired through a previous unlawful search and seizure. It is apparent therefore that the case was concerned only with the very evidence which had itself

been obtained, except for its physical custody, through the unlawful search and seizure.

There is, however, we submit, a complete analogy in the case of confessions. It has long been settled that even though an involuntary confession is not admissible, the facts and information discovered in consequence of such a confession are not incompetent. *Wigmore on Evidence*, 2d ed., Sec. 859, and cases cited.

It should also be pointed out that while in many cases evidence obtained by illegal search and seizure has been ordered suppressed or excluded, there is, so far as we are aware, no case in which a conviction has been set at naught because the court was not satisfied that the Government had proved its case by evidence wholly independent of leads obtained from the illegally seized evidence.

Moreover, the court below has succinctly pointed out very cogent reasons making against the contention urged by the petitioners. The court clearly shows that if the privilege of an accused extends beyond the introduction of the intercepted communications themselves, there is no practical way in which the accused can avail himself of this privilege other than by a complete discovery of how the prosecution prepared its case. Obviously, however, to require such a disclosure would often hopelessly handicap the prosecution and might, indeed, confer complete immunity upon a criminal because of the initial mistake of a law enforcement officer—even the lowest subordinate.

For the reasons stated, we submit that the petitioners were not entitled to any inquiry into the source of the Government's evidence. It follows, therefore, that the trial court did not commit reversible error in limiting the inquiry which the petitioners attempted in the instant case.

CONCLUSION

The case was correctly decided below and there is involved no conflict of decisions. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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